



1 **Education and Workforce Development Cabinet**

2 **Kentucky Board of Education**

3 **Department of Education**

4 **(Amended After Comments)**

5 **703 KAR 5:070. Procedures for the inclusion of special populations in the state-required**
6 **assessment and accountability programs.**

7 **RELATES TO:** KRS 158.6451, 158.6453, 158.6455

8 **STATUTORY AUTHORITY:** KRS 156.029, 156.070, 158.6453, 158.6455

9 **NECESSITY, FUNCTION, AND CONFORMITY:** KRS 158.6455 provides the Kentucky Board
10 of Education with the authority to promulgate administrative regulations to establish a system of
11 determining successful schools and a system of rewards and assistance for certified staff in
12 schools and districts. This administrative regulation establishes procedures for the inclusion of
13 special student populations in the state-required assessment and accountability programs.

14 **Section 1. Incorporation by Reference.** (1) "Procedures for Inclusion of Special Populations in
15 the State-Required Assessment and Accountability Programs", **February 2014** [~~December 2013~~]
16 [~~February 12, 2009~~], is incorporated by reference.

17 (2) This material may be inspected, copied, or obtained, subject to applicable copyright law, at
18 the Department of Education, Office of Assessment and Accountability, 18th Floor, Capitol
19 Plaza Tower, 500 Mero Street, Frankfort, Kentucky, Monday through Friday, 8 a.m. to 4:30 p.m.

This is to certify that the chief state school officer has reviewed and recommended this administrative regulation prior to its adoption by the Kentucky Board of Education, as required by KRS 156.070(5).

2-14-14

(Date)



Terry Holliday, Ph.D.
Commissioner of Education

2-14-14

(Date)



Roger L. Marcum, Chairperson
Kentucky Board of Education

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Administrative Regulation: 703 KAR 5:070

Agency Contact Person: Kevin C. Brown

(1) Provide a brief summary of:

(a) What this administrative regulation does: This administrative regulation establishes procedures for the inclusion of special student populations in the state-required assessment and accountability system that classifies schools and districts.

(b) The necessity of this administrative regulation: KRS 158.6453 requires the Kentucky Board of Education to create and implement a balanced statewide assessment program that measures the achievement of students, schools and districts, complies with the federal No Child Left Behind Act of 2001, 20 U.S.C. secs. 6301 et seq., or its successor and ensures accountability.

(c) How this administrative regulation conforms to the content of the authorizing statute: This administrative regulation provides information necessary for implementation of the statewide assessment and accountability system. The regulation provides procedures for inclusion of special populations in the requirements of KRS 158.6453, KRS 158.6455 and the No Child Left Behind Act of 2001, 20 U.S.C. secs. 6301 et seq.

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: This administrative regulation provides guidance on the inclusion of student special populations in the state-required assessment and accountability programs. The regulation defines accommodations permitted with state-required testing for students with education plans (i.e., Individualized Education Program (IEP), 504 Plan and Program Services Plan for English learners) and for students enrolled in particular programs (i.e., alternative programs, state agency, home/hospital settings); and for students participating in the alternate assessment program.

(2) If this is an amendment to an existing administrative regulation, provide a brief summary of:

(a) How the amendment will change this existing administrative regulation: The amendment makes policy changes (i.e., reduce prompting and cueing to a cue to remain on task; add a 3 x 5 notecard under manipulatives; for English learners, remove student-generated glossaries and focus on word-to-word translation); removes outdated terminology; reorganizes the document incorporated by reference and adds clarification.

(b) The necessity of the amendment to this administrative regulation: The amendment provides clarification on Kentucky's accommodation policy to improve the implementation in Kentucky classrooms.

(c) How the amendment conforms to the content of the authorizing statute: The amendment provides guidance on inclusion of special populations in the requirements of KRS 158.6453, KRS 158.6455 and the No Child Left Behind Act of 2001, 20 U.S.C. secs. 6301 et seq.

(d) How the amendment will assist in the effective administration of the statutes: The amendment provides necessary clarification on testing accommodations to ensure valid test results.

(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation: All public school districts in Kentucky and supporting staff in the Kentucky Department of Education.

(4) Provide an analysis of how the entities identified in question (3) will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including: The regulation will impact schools and districts by providing guidance on the inclusion of students in special populations in assessment and accountability system used to classify school and district performance.

(a) List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment: Staff in schools and school districts administers the state-required assessment using consistent rules and procedures. The amendment ensures consistent procedures for the inclusion of students in special populations.

(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3): There are no new costs to school districts.

(c) As a result of compliance, what benefits will accrue to the entities identified in question (3): Kentucky schools and districts will have clear guidance on the inclusion of students in special populations.

(5) Provide an estimate of how much it will cost the administrative body to implement this administrative regulation:

(a) Initially: The proposed amendment will require development of new explanatory materials and data programs for new assessment and accountability program in the normal course of work for staff. No additional costs are expected.

(b) On a continuing basis: The proposed regulation does not result in additional costs.

(6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation: KDE operating funds

(7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new, or by the change if it is an amendment: Current funding supports implementation and data reporting for school and district accountability.

(8) State whether or not this administrative regulation establishes any fees or directly or indirectly increases any fees: This administrative regulation does not establish fees or directly or indirectly increase any fees.

(9) TIERING: Is tiering applied? (Explain why or why not) Tiering was not appropriate in this administrative regulation because the administrative regulation applies equally to all school districts.

FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

Regulation Number: 703 KAR 5:070

Contact Person: Kevin C. Brown

Phone number: 502-564-4474

(1) What units, parts, or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation? School districts

(2) Identify each state or federal statute or federal regulation that requires or authorizes the action taken by the administrative regulation.

KRS 158.6453, KRS 158.6455 and the No Child Left Behind Act of 2001, 20 U.S.C. secs. 6301 et seq.

(3) Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the administrative regulation is to be in effect.

There will be no additional revenue generated by this administrative regulation. No additional costs to school districts are expected.

(a) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year? None

(b) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years? None

(c) How much will it cost to administer this program for the first year? The proposed regulation will require no additional cost.

(d) How much will it cost to administer this program for subsequent years? The proposed regulation will require no additional cost.

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Revenues (+/-):

Expenditures (+/-):

Other Explanation:

Summary of Material Incorporated by Reference and
Summary of Changes to Material Incorporated by Reference

703 KAR 5:070. Procedures for the inclusion of special populations in the state-required assessment and accountability programs

- (1) The following documents are incorporated by reference:
 - (a) "Inclusion of Special Populations in the State-Required Assessment and Accountability Programs" 703 KAR 5:070, **February 2014** ~~[December 2013]~~ ~~[February 12, 2009]~~
- (2) This document is to provide direction for the inclusion of special populations in the state-required assessment and accountability programs. KRS 158.6453. KRS 158.6455, and the No Child Left Behind Act of 2001, 20 U.S.C. Secs. 6301 et. seq.
- (3) The document incorporated by reference consist of (35) pages.

**STATEMENT OF CONSIDERATION
RELATING TO 703 KAR 5:070
Inclusion of Special Populations in the State-Required Assessment and Accountability
Programs**

**Kentucky Department of Education
Office of Assessment and Accountability**

Amended After Comments

1. A public hearing was scheduled on the above regulation on January 23, 2014 at 2:00 p.m. Eastern Time, in the State Board Room, Kentucky Department of Education, 500 Mero Street, 1st Floor, Frankfort, Kentucky, but was canceled when no one indicated that they wanted to speak.

2. The following individuals submitted written comments:

<u>Name and Title</u>	<u>Agency/Organization/Entity/Other</u>
Teresa T. Combs, Director of Legal and Administrative Training Services	Kentucky School Board Association (KSBA)
Malicia T. Hitch, Staff Attorney	Protection and Advocacy
Mary W. Ruble, Asst Executive Dir	KY Education Association (KEA)

3. The following people from the promulgating administrative body responded to the written comments:

Name and Title

Kevin C. Brown, General Counsel/Associate Commissioner, Office of Guiding Support Services
Felicia Cumings Smith, Associate Commissioner, Office of Next Generation Learners
Ken Draut, Associate Commissioner, Office of Assessment and Accountability
Johnny Collett, Director, Division of Learning Services
Sammie Lambert, Assistant Director, Division of Learning Services
Denise Bailey, Branch Manager, Division of Learning Services
Rhonda Sims, Director, Division of Support and Research
Bridget Stanfield, Branch Manager, Division of Support and Research
Joy Barr, Education Consultant, Division of Support and Research
Cindy Greer, Education Consultant, Division of Support and Research
Kathy Moore, Education Consultant, Division of Support and Research
Kevin O'Hair, Education Consultant, Division of Support and Research
David Wickersham, Assistant General Counsel, Office of Guiding Support Services

Summary of Comments and Responses

- (1) Subject Matter: Student initiation of accommodations
KSBA and KEA

- (a) Comment: A commenter suggested that the document incorporated by reference is unclear about whether the provision that students are to initiate accommodations, unless the district has data that the child cannot request the accommodation, is to apply to all types of accommodations. The comment indicated that it is confusing if the student-initiated statement was not repeated in all the accommodation sections.

A commenter stated that the formal decision-making process set out in a student's individualized learning plan may conflict with the requirement that accommodations be student initiated. The commenter suggested that if an ARC has determined that a student lacks capacity or is developing capacity to initiate accommodations, but still has not reached the point where independent decision-making regarding the use of accommodations is the norm, suddenly forcing the student to make independent decisions regarding the use of accommodations and also forcing the student to initiate those requests during testing seems extreme and counterproductive. The commenter suggested that the educational interests of students are best served by allowing them to initiate accommodations during testing, but not requiring them to do so.

A commenter stated that requiring students to request or initiate readers or scribes means that school districts will be required to have trained readers or scribes available for each student in case a request is made, even though readers or scribes may not be used. The commenter suggested that if a student does not understand that the student needs to specifically request assistance (accommodation) during testing, not only will the student miss an opportunity to be appropriately assisted during the testing process, the school district will also have pointlessly gone to the expense of identifying, training and compensating readers and scribes that may never be used.

- (b) Response: The agency has carefully reviewed these comments and agrees that clarifying statements are needed. The agency does not intend to add a process outside of existing processes for individualized planning. Rather, the agency's intent is to ensure that the decision-making process around accommodations intentionally includes discussions concerning how districts will determine whether the accommodations it selects are effective, as well as plan to fade those accommodations, as appropriate. The agency's approach is based, in part, on the agency's ongoing monitoring of school districts and the general absence of documentation showing that these discussions are presently occurring as part of the decision-making process. This does not conflict with the requirement that accommodations be student-initiated.

The agency will amend the document incorporated by reference to clarify student initiated accommodations. The agency will amend the document incorporated by reference to better define the concept of student initiated. Amendments provide that teachers or proctors may review available accommodations, remind students they are

there to provide the accommodations and revisit this information before each test session. Teachers may ask if a student wants to use the student's accommodations, and an affirmative response from the student is considered student initiated.

If a student's primary means of communication is through an interpreter, then the student is not required to initiate the use of the accommodation. If the student uses an interpreter only on occasion, or in certain content areas, student initiation is expected.

The agency will amend the document incorporated by reference to clarify an accommodation that requires interaction with the teacher or proctor in order for the accommodation to be effective. Behavior Modification Plans are supports to help the student stay focused on the task. It is not expected that a student would announce being off task or in need of behavior redirection. This accommodation requires the teacher to observe and decide whether the student has lost focus and is in need of redirection.

In response to the comment that requiring students to request or initiate readers or scribes means that school districts will be required to have trained readers or scribes available for each student in case a request is made, the agency notes that schools and districts are already required to make accommodations available.

- (2) Subject Matter: The destruction of testing materials
KSBA
 - (a) Comment: The commenter expressed a concern that the mandatory destruction of certain testing materials might violate the Kentucky Records Retention Schedule for Public School Districts.
 - (b) Response: No change has been made in response to this thoughtful comment. The agency contacted the Kentucky Department of Libraries and Archives (KDLA) to share the provisions of the regulation and the concern raised in this comment. The paper test documents are considered the official or "record copy". What would be temporarily stored on a computer, cd, or flash drive, and contemplated for destruction, would be copies of the original document. Once test documents are printed, the printed copies become the official version, allowing all 'copies' of the original to be destroyed without violation of the Kentucky Records Retention Schedule.
- (3) Subject Matter: The use of assistive technology
Protection & Advocacy
 - (a) Comment: The commenter shared a concern that assistive technology is evolving at a rapid pace and that some devices or programs may not be compatible with the state test from year to year. The commenter questioned how students and teachers will be certain that assistive technology will be compatible with current state tests and will avoid disruption due to incompatible technology. The comment did not request a specific amendment.

- (b) Response: The agency has carefully considered this valuable comment and agrees with the commenter that technology is rapidly changing. The agency strives to provide the state assessment in the best and latest formats possible within the guidelines given by legislation.

Vendors, technology, and budget all impact what will be available in any given year. The agency makes every effort to find the most effective and efficient way of assessing all students.

The agency offers training each year for all assessments in order to update and keep educators informed of what is new or changing. The training includes the assessment of special populations and how the agency is working to meet student needs. The agency will continue to work with districts and teachers to determine what technology is compatible with the assessment for the current year.

- (4) Subject Matter: Extended Time
Protection & Advocacy
KEA

- (a) Comment: One commenter expressed concern regarding student requests for extended time and when such requests may be made. The commenter requested clarification regarding who decides whether a student is demonstrating on task efforts and whether a student is making progress and should be granted or denied extended time. The commenter also inquired whether extended time could be withdrawn, once granted, and about the duration of extended time.

A commenter inquired about the mechanism for requesting extended time, whether a student must request a specific amount of time, and when the student must request extended time.

- (b) Response: The agency has carefully considered these important comments. Because a student would not know in advance of making the request whether the student will need extended time, the student would request extended time when normal testing time has ended or is about to end. To request extended time, the student need only indicate to the proctor or teacher that the student is not finished and wishes to use extended time to finish the test; the student would then be given extra time, provided that the student had demonstrated on-task behavior during the regular schedule testing time.

As indicated by current guidance provided by the agency, schools arrange to have a place for students who require extended time to continue working in the event that a student needs to use additional time. The agency provides training each year regarding accommodations and how they should be offered and provided to students.

As with instructional time, some accommodations require frequent interaction and monitoring by a proctor or teacher as a student works on an assessment. A student using an audio accommodation may start and stop an audio player. A student with a human

reader will listen and then stop while answering questions. For a student to receive extended time, the student must be working on the test. Using the same judgment used during instructional time, the teacher or proctor will determine if the student has been on-task. If the student has made progress and is giving effort to complete the assessment, the student would receive extended time. No change has been made in response to these comments.

(5) Subject Matter: Size of allowable graphic organizer
KEA

(a) Comment: A commenter stated that limiting the size of the allowable graphic organizer prompt to a 3 x 5 inch card will unnecessarily disadvantage severely visually impaired students, and requested that the regulation make a reasonable allowance for this subpopulation of students.

(b) Response: The agency has carefully considered and agrees with this valuable comment. The agency will amend the regulation to permit students with visual impairments and who require large-print materials to magnify or increase the 3 x 5 inch card to a size that is usable for the student.

(6) Subject Matter: Prompting and cueing
KEA

(a) Comment: A commenter stated the regulation specifies that prompts and cues shall only include verbal and non-verbal (gestural, written or visual) prompts and cues to attend to task. The commenter stated that, accordingly, prompting and cueing are not accommodations, but are instead instructional techniques that should be available for use with all special population students regardless of whether such use is specifically spelled out in an IEP or 504 Plan. The commenter noted that the Administration Code for the State Assessment and Accountability Program (incorporated by reference into 703 KAR 5:080) states, for all students, "words of encouragement and general instructions that direct students to apply themselves to the task at hand, but do not imply evaluation of student work or allow an advantage are permissible." The commenter suggested that the regulation permits prompting and cueing for all students to stay on task, while inadvertently restricting those techniques to special population students who have a specific reference to such techniques in an IEP or 504 plan. The commenter suggested that the language requiring the technique to have been previously considered by the ARC be removed.

(b) Response: The agency has carefully considered this thoughtful comment, and agrees that 703 KAR 5:080 permits all test takers verbal and non-verbal (gestural, written or visual) prompts and cues to attend to task. The agency agrees that reference to prompting and cueing is no longer needed in 703 KAR 5:070, and will make an amendment to delete such references. This regulation is confined to assessment, and specific references to prompting and cueing in an IEP or 504 plan designed for instructional purposes may be appropriate.

- (7) Subject Matter: Readers repeating directions, prompts, situations, and passages without a specific request from student
KEA
- (a) Comment: The commenter stated that a reader should be permitted to repeat directions, prompts, situations and passages without a specific request from a student. The commenter stated that students, particularly younger ones, often communicate confusion through non-verbal cues, and educators are trained to pick up on those cues and offer appropriate support. The commenter suggested that the requirement of a specific request from a student imposes a pointless barrier to an acceptable accommodation and provides an unfair advantage to older students and students who will know to take advantage of the requirement.
- (b) Response: The agency has carefully considered this thoughtful comment. The time limits of test administration do not logistically permit all information to be re-read by a reader. The agency notes that implementing the suggested change would vest the decision of whether to re-read information with the proctor. If student confusion triggers re-reading, the agency submits that it is reasonable to assume that a proctor will, correctly, think a student is confused when the student selects an incorrect response. The decision to re-read could thus provide students with an unintended evaluation of their work during a testing situation, and could increase allegations of inappropriate testing practices. Consequently, no amendment has been made in response to this comment.

Summary of Statement of Consideration and Action Taken by Promulgating Administrative Body

The Kentucky Department of Education has responded to comments from the public regarding proposed amendments to 703 KAR 5:070. Comments requested the addition of specific language, the replacement of other language, and the reconsideration of certain components of the document incorporated by reference into the regulation. In making amendments, the agency identified punctuation, layout changes, and phrasing changes that were necessary to provide clarity of meaning.

Commenters requested clarification regarding student initiated accommodations. The agency will amend the document incorporated by reference to better define the concept of student initiated. Amendments will clarify that teachers or proctors may review available accommodations, remind students they are there to provide the accommodations, and revisit this information before each test session. Teachers may ask if a student wants to use the student's accommodations, and an affirmative response from the student is considered student initiated.

A commenter expressed a concern that the mandatory destruction of certain testing materials might violate the Kentucky Records Retention Schedule for Public School Districts. This thoughtful comment prompted additional research by the agency, which indicated that no amendment was necessary.

A commenter shared a concern that assistive technology is evolving at a rapid pace and that some devices or programs may not be compatible with the state test from year to year. The comment did not request a specific amendment, and none was made in response to this comment.

A commenter expressed concern regarding student requests for extended time and when such requests may be made. The commenter requested clarification regarding who decides whether a student is demonstrating on task efforts and whether a student is making progress and should be granted or denied extended time. The commenter also inquired whether extended time could be withdrawn, once granted, and about the duration of extended time. The commenter did not request a specific amendment, and none was made in response to this comment.

A commenter stated that limiting the size of the allowable graphic organizer prompt to a 3 x 5 inch card will unnecessarily disadvantage severely visually impaired students, and requested that the regulation make a reasonable allowance for this subpopulation of students. The agency agrees with this insightful comment, and has amended the document incorporated by reference accordingly.

A commenter stated the regulation specifies that prompts and cues shall only include verbal and non-verbal (gestural, written or visual) prompts and cues to attend to task. The commenter stated that, accordingly, prompting and cueing are not accommodations, but are instead instructional techniques that should be available for use with all special population students regardless of whether such use is specifically spelled out in an IEP or 504 Plan. The agency agrees with this comment and has amended the document incorporated by reference.

A commenter stated that a reader should be permitted to repeat directions, prompts, situations and passages without a specific request from the student. The agency has carefully considered this thoughtful comment and determined that implementing the suggested change would vest the decision of whether to re-read information with the proctor. Concerned that a proctor's unrequested decision to re-read could provide students with an unintended evaluation of their work during a testing situation, and could increase allegations of inappropriate testing practices, the agency has made no amendment in response to this comment.

The agency proposes the following amendments after comments:

Section 1(1)

Page 1

Line 15

After "Programs", insert "February 2014".
Delete "December 2013".

MATERIAL INCORPORATED BY REFERENCE

Page 5

Section: General Conditions For Using Accommodations (A) (1), add a statement about interpreters in the following sentence: Student initiated applies to assistive technology (when it is not the student's primary mode of communication), "Interpreter (when it is not the student's primary mode of communication)", manipulatives, reader, scribe, calculator, paraphrasing, and extended time.

Page 5

Section: General Conditions for Using Accommodations (A) (1), add as the last sentence, "Behavior Modification is not student initiated because it is an accommodation that requires teacher monitoring and interaction. The proctor or instructor should continue with behavior modifications to stay on task during the state assessments in the same manner as they have during instruction."

Page 7, 16, 30, 34, and 37

Remove references to prompting and cueing.

Page 10

Section 1(1)

First paragraph, second to last sentence remove "their only form of standard" and replace it with "the student's primary mode of".

Page 13

Section 1 (2)

Add "enlargement of 3x5 card for visually impaired students."

Page 17

Section 2

First bullet, remove "and are not to be consecutive." Add a period after "cumulative."

Page 19

Section 2

Fifth bullet, remove ", if specifically requested by the student." Add a period after "readers."

Page 19

Section 2

First paragraph, remove "Simplified language replaced paraphrasing but provides very similar supports."

Page 20

Section 2

First bullet, remove bullet and after easier add "for the student to understand."

Page 24

Section 3(1)

Second sentence remove "only form of standard" and replace with "primary mode of".

Page 25

Section 3 (1)

First paragraph, remove "If it is necessary for a student with a 504 Plan to complete written work (including responses to test items) on a computer and this accommodation is noted on a student's 504 Plan and if this procedure is routinely used in the student's regular instructional program, it may be used when responding to constructed- or extended-response questions, short-answer and on-demand writing while participating in the state-required assessment."

Replace with "If it is necessary for a student with a 504 Plan to complete written work (including responses to test items) on a computer and the accommodation is noted in the 504 plan and used routinely in regular instruction, it may be used on the state-required assessment."

Page 26

Section 3 (2)

Third paragraph, first sentence remove "allowed, students" and replace with "offered, a student."

Page 31

Section 5(2)

First bullet, Remove "If participation in the state-required assessment would jeopardize a student's physical, mental or emotional well-being, a school or district shall submit a request for a medical non-participant, which is subject to the approval of KDE and which describes the medical condition that warrants a student not participating in some or all portions of the assessments."

Replace with "if participation in the state-required assessment would jeopardize a student's physical, mental or emotional well-being, a school or district shall submit a medical non-participation request which describes the medical condition that warrants a student not participating in some or all portions of the assessment. The request is subject to the approval of KDE."

Page 31

Section 5

Last paragraph, first sentence, remove "Section 2" and replace with "the General Conditions for Using Accommodations section."

Pages 3, 4, 9, 13, 14, 15, 17, 18, 21, 22, 25, 36

Spacing and alignment corrections were made for consistency.

Pages 19, 20, 29

Bullets were changed for consistency.

Pages 3, 4, 5, 6, 9, 10, 12, 13, 16, 17, 18, 19, 20, 21, 23
Punctuation was corrected for consistency.

Pages 3, 7, 19
Capital letters were added and removed for consistency.

Pages 3, 5, 6, 10, 16, 20, 23
Subject/verb tenses were corrected for consistency.

Pages 7, 8, 9, 12
Adverb tense corrections made for consistency.